SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 28 1962
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No. 551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

H. A. LOTT, LEE BLOCKER AND LORN D. FRAZIER,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S ARGUMENT

Respondent has utterly failed to show any reason why certiorari should not be granted.

Conceding by its silence that the petition raises *very important* questions of criminal procedure, and being unable to point to any reason why these fundamental issues should not be resolved by this Court, the Government argues only (1) that the issues were not "properly raised" (Br. 7-9), and (2) that the position of Petitioners on the issues is "without merit" (Br. 9-15). Neither argument is particularly relevant to the instant question, *i.e.*, whether or not certiorari should be granted, and both are entirely fallacious.

It is most surprising to find the Government arguing — *at this late date* and *without authority* — that the questions

presented were not "properly raised" in the courts below. Each of the questions presented was precisely briefed, argued and *decided* in the Court of Appeals (Pet. 7a-28a), and there the Government made no argument that the issues were not properly before the court. Indeed, this Court had remanded the case to the Court of Appeals for the purpose of enabling it to decide such issues. With only slight variations in presentation, these issues were briefed and argued by both sides before this Court on the earlier grant of certiorari, but the Court elected not to determine them because they had not yet been decided by the Court of Appeals.

Everything reasonably possible was done to raise in the trial court the questions presented. The indictment was strenuously attacked before and after judgment (R. 61-80; 559-568; 578-580). Of course, while Petitioners were awaiting sentence after their pleas of *nolo contendere*, hoping for and expecting mercy from the trial court, they could not object to the action of the trial court in trying them *in absentia*, in effect, during the Farnsworth trial.[1] In the first submission to the Court of Appeals and in this Court, Petitioners argued all along the substance of the questions here presented: (1) that the indictment was insufficient, (2) that the trial court committed error in basing the convictions and sentences upon evidence adduced at the Farnsworth trial, and (3) that the judgments convicted Petitioners of misdemeanors. Further briefing and argument has naturally resulted in further delineation of and elaboration upon these basic contentions of error — but *no new matter* has been raised. Most of Petitioners' contentions go to the jurisdiction of the trial court and the failure of the indict-

[1] Although the record does not reflect it, it is a fact that counsel for Petitioner Lott, when considering a change of plea from "not guilty" to *nolo contendere*, requested the trial court to sentence him prior to the Farnsworth trial, in the event that a *nolo contendere* plea was accepted. It is also true that the trial court refused to grant this request.

ment to charge an offense, which "shall be noticed by the court at any time during the pendency of the proceeding." Fed. R. Crim. P. 12(b)(2). Furthermore, in any event, "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). The errors raised by Petitioners are indeed *plain* and affect their freedom — the *most precious right*.

The Government's sketchy "broad-brush" argument on the merits serves only to emphasize the importance of the questions and the compelling reasons why certiorari should be granted. It would not be appropriate for Petitioners to present a detailed argument on the merits in this reply brief,[2] but it does not seem amiss to point out a few of the inaccuracies, incongruities and omissions in the Brief in Opposition. The Government does not attempt to square the decision below with *Russell* v. *United States*, 369 U.S. 749 (1962), discussed in the Petition, p. 14. It does not answer the eminently reasonable proposition that an indictment of employees for attempted evasion of taxes of a large corporation is quite different from a charge that an individual attempted to evade his own taxes, and that such an indictment should do more than merely follow the language of the statute — *at a minimum it should show what wrongful acts are attributed to each of the accused employees.* The Government states that "There was also no need for the indictment to allege that the taxes actually paid by the corporation were deficient" (Br. 11), ignoring the long line of cases which have held that existence of a tax deficiency is an *essential element* of the offense.[3]

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[2] Petitioners' contentions were set out in detail when this case was first before this Court. Brief for Petitioners, No. 238, October Term, 1960, pp. 25-55.

[3] Pet., p. 14; Brief for Petitioners, No. 238, October Term, 1960, p. 29.

The obviously unreasonable and prejudicial delay in sentencing, in violation of Rule 32(a), is said to be all right because "the trial judge wished to await the trial of petitioners' co-defendants" (Br. 12). Then the Government argues in effect that if Petitioners were tried *in absentia* such procedure was within the discretion of the trial court. No answer is made to Petitioners' contention that the trial *in absentia* of the issue of guilt or innocence, which was precluded by the acceptance of *nolo contendere* pleas, constituted an implied rejection of those pleas. And *finally*, the Government presents no reason why this Court should not decide the important issue concerning the effect of *variances* between the oral pronouncement and the written judgment.

In short, the Brief in Opposition wholly fails to show any ground for denial of the petition for a writ of certiorari.

CONCLUSION

For the reasons stated therein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November, 1962.

PROOF OF SERVICE

I, William M. Ryan, one of the attorneys for the Petitioners herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 27th day of November, 1962, I served copies of the foregoing Petitioners' Reply to Brief in Opposition on the United States by mailing five copies in a duly addressed envelope, with air mail postage prepaid, to Archibald Cox, Esq., Solicitor General of the United States, United States Department of Justice, Washington 25, D. C.; by mailing five copies in a duly addressed envelope, with air mail postage prepaid, to Louis F. Oberdorfer, Esq., Assistant Attorney General — Tax Division, United States Department of Justice, Washington 25, D. C.; and by mailing five copies in a duly addressed envelope, with first class postage prepaid, to Woodrow B. Seals, Esq., United States Attorney for the Southern District of Texas, New Federal Building, 515 Rusk Avenue, Houston 2, Texas.

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